

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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DIANE MARY FELTZ,

Plaintiff,

v.

UNITED STATES,

Defendant.

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OPINION & ORDER

13-cv-749-wmc

In this proposed civil action for wrongful death brought pursuant to the Federal Tort Claims Act (“FTCA”), 28 U.S.C. § 2679, plaintiff Diane Mary Feltz alleges that the negligent refusal of a Department of Veterans Affairs (“VA”) pharmacist to dispense her husband Myron Feltz’s medication caused him to commit suicide in March of 2010. Feltz has been granted leave to proceed *in forma pauperis* and has paid her initial partial filing fee. The court must next screen her case to determine whether it: (1) is frivolous or malicious; (2) fails to state a claim on which relief can be granted; or (3) seeks money damages from a defendant who is immune from such relief. 28 U.S.C. § 1915(e)(2). After reviewing Feltz’s allegations, the court concludes that this action is time-barred based on the facts Feltz pleads in her complaint. Accordingly, it will dismiss her case.

ALLEGATIONS OF FACT

In reviewing the pleadings of any *pro se* litigant, the court must read the allegations of the complaint generously. *Haines v. Kerner*, 404 U.S. 519, 521 (1972).<sup>1</sup> For the purposes of screening, Feltz alleges, and the court assumes, the following facts.

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<sup>1</sup> Feltz has attached a Memorandum to her complaint. (See dkt. #2.) Pursuant to Federal Rule of Civil Procedure 10(c), the court considers it as part of the pleadings.

Diane Feltz's husband Myron Feltz was a Vietnam veteran whose service in Vietnam left him with serious mental and physical health problems, including post-traumatic stress disorder, major recurrent depression and schizoaffective disorder. Myron had been prescribed about 22 different types of medications and did not know the name or type of most of them. Six of these medications were for treatment of mental health issues or pain management. For fifteen years, up until March 3, 2010, Diane dispensed Myron's medications.

On March 3, 2010, VA doctor John Edwards decided that Diane would no longer dispense Myron's medications. Instead, Myron would receive two-week supplies of his medications directly from the VA. This change was allegedly due to an "ongoing problem" with medication management. Beginning on that date, Myron was to report to the VA every two weeks to have his box refilled. Myron accordingly reported to the VA for his first medication box filling on March 8, 2010.

On March 22, 2010, Myron returned to the VA to have his medication box refilled. Pursuant to a narcotic contract that Myron had signed in 2009 after testing positive for hydrocodone and opiates, Myron was expected to submit a urine sample before receiving his medications. However, Myron was unable to provide a sample at that time, due at least in part to an enlarged prostate. He had been prescribed medication for that condition, but had been without it for two weeks by March 22.

Because Myron could not submit a urine sample, the VA pharmacist, Angie Cournoyr, refused to dispense Myron's medications. Myron returned home and initially refused to return to the VA that afternoon. Diane convinced him to drink some coffee and

water and return to the VA, but Myron was again unable to produce a urine sample and left without his medications.

When Myron returned home for a second time without his medications, Diane contacted Cournoyr to ask how she expected Myron to provide a sample without his prostate medication. In response, Cournoyr asserted that Myron had requested *not* to be given the medications. Diane then contacted Myron's social worker, Chris Zaglifa, for assistance. Zaglifa agreed to see Myron the following morning.

That same night, Myron was clearly agitated and approaching 24 hours without access to his medications. After both Myron and Diane had gone to bed, Myron got up and informed Diane he was going to walk in the woods. This was typical behavior for Myron, who frequently "checked the perimeter" of their property and carried a gun with him at those times. Sometime thereafter, Diane heard a gunshot. She got up and searched the property. Several minutes later, she found Myron near the house. He had committed suicide by shooting himself in the chest.

## OPINION

"The FTCA allows individuals to sue the government for personal injuries or death under circumstances where the government would be liable if it were a private individual, and in accordance with the law of the state where the wrongful conduct occurred." *Stephenson v. Stone*, 21 F.3d 159, 162 (7th Cir. 1994). "Thus, individuals are generally capable of recovering from the government and its agencies for injuries sustained as a result of a government employee's negligence." *Id.* An FTCA claim has six elements: a plaintiff may bring a claim (1) against the United States (not individual government agencies or

employees); (2) for money damages; (3) for injury or loss of property; (4) caused by the negligent or wrongful act or omission of any employee of the government; (5) while acting within the scope of his office or employment; (6) under circumstances in which the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred. 28 U.S.C. § 1346(b)(1); *see also Federal Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 477 (1994) (describing the six elements of FTCA claim).

The first three elements of an FTCA claim are indisputably met. Feltz brings this action (1) against the United States (2) for money damages (3) for her husband's wrongful death. With respect to element (4), Feltz at least alleges that the VA pharmacist's decision not to dispense Myron's medications on March 22, 2010, was negligent and caused his death by depriving him of the medications he needed. Element (5) requires that the pharmacist have been acting within the scope of her employment. For screening purposes, the court will infer this is so given the other facts Feltz alleges.

Finally, element (6) requires that the circumstances be such that the United States, if a private person, would be liable in accordance with Wisconsin law. Essentially, Feltz brings a claim for wrongful death predicated on the VA pharmacist's negligence. Wisconsin recognizes a statutory cause of action for wrongful death "[w]henver the death of a person shall be caused by a wrongful act, neglect or default and the act, neglect or default is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof."<sup>2</sup> *See* Wis. Stat. § 895.03. Thus, the only question

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<sup>2</sup> Under Wisconsin law, a wrongful death claim belongs to the surviving spouse, subject to certain protections for the deceased's minor children. *Bowen v. Am. Family Ins. Co.*, 2012 WI App 29, ¶ 4, 340 Wis. 2d 232, 811 N.W.2d 887. Thus, Feltz has the right to bring the present suit.

remaining for screening purposes is whether Feltz has pled a colorable claim of negligence on the part of the VA pharmacist.

To prevail on a claim for negligence in Wisconsin, a plaintiff must prove: (1) the existence of a duty of care on the defendant's part; (2) a breach of that duty; (3) a causal connection between the defendant's breach and the plaintiff's injury; and (4) actual loss or damage resulting from the injury. *Gritzner v. Michael R.*, 2000 WI 68, ¶ 19, 235 Wis. 2d 781, 611 N.W.2d 906. A duty of care exists under Wisconsin law whenever "it was foreseeable to the defendant that his or her act or omission to act might cause harm to some other person." *Id.* at ¶ 20. The court has no difficulty concluding that a VA pharmacist would have a duty of care with respect to filling prescriptions for their VA patients. Feltz alleges that the pharmacist breached that duty of care by refusing to dispense Myron's medications when he could not provide a urine sample, and that this refusal caused Myron's suicide. While both allegations will likely require expert testimony to survive summary judgment, Feltz has at least alleged circumstances under which the United States *might* arguably be liable for negligence pursuant to Wisconsin law.

However, there is a more fundamental problem that bars Feltz's claim -- the applicable statute of limitations. "Dismissing a complaint as untimely at the pleading stage is an unusual step, since a complaint need not anticipate and overcome affirmative defenses, such as the statute of limitations." *Cancer Found., Inc. v. Cerberus Capital Mgmt., LP*, 559 F.3d 671, 674 (7th Cir. 2009). "But dismissal is appropriate when the plaintiff pleads himself out of court by alleging facts sufficient to establish the complaint's tardiness." *Id.* at 674-75 (citing *Hollander v. Brown*, 457 F.3d 688, 691 n.1 (7th Cir. 2006)).

Wisconsin’s medical malpractice statute requires that “an action to recover damages for injury arising from any treatment or operation performed by, or from any omission by, a person who is a health care provider, regardless of the theory on which the action is based, . . . be commenced within the later of (a) Three years from the date of the injury, or (b) One year from the date the injury was discovered or, in the exercise of reasonable diligence should have been discovered[.]” Wis. Stat. § 893.55(1m). “The term ‘health care provider’ in sec. 893.55, Stats., plainly applies to anyone who professionally provides health care to others.” *Clark v. Erdmann*, 161 Wis. 2d 428, 438, 468 N.W.2d 18 (1991); *see also Doe v. Am. Nat’l Red Cross*, 176 Wis. 2d 610, 616-17, 500 N.W.2d 264 (1993). Though Wisconsin state courts have not addressed whether “pharmacists” fall into that category, they are “involved in the diagnosis, treatment or care of patients” and “licensed by a state examining board,” which strongly suggests they are “health care providers” within the meaning of the statute. *See Clark*, 161 Wis. 2d at 438-39 (podiatrists are health care providers because they provide health care and are licensed to practice by state medical examining board); Wis. Stat. § 450.03 (requiring pharmacists to be licensed by board).<sup>3</sup>

Feltz has pled that her husband committed suicide on March 22, 2010, the same day that the alleged negligence occurred. She has also pled that she knew of the injury that same day, meaning that under Wis. Stat. § 893.55(1m)(a), she was required to bring this lawsuit by March 22, 2013. However, she did not file her complaint until October 25, 2013, seven months too late. (*See Compl. (dkt. #1)*.) Accordingly, although the court is

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<sup>3</sup> Alternatively, if pharmacists are *not* health care providers within the meaning of Wis. Stat. § 893.55, then the statute of limitations for injury to the person would apply. *See* Wis. Stat. § 893.54(2) (statute applies to “[a]n action brought to recover damages for death caused by the wrongful act, neglect or default of another”). That is likewise a three-year statute of limitations, meaning that Feltz’s suit is time-barred under either statute.

deeply sympathetic to the tragedy and pain she has endured, her action is time-barred by the applicable statute of limitations, and she may not proceed on her claims in this lawsuit.

ORDER

IT IS ORDERED that:

- 1) Plaintiff Diane Feltz's request to proceed on this claim is DENIED.
- 2) The clerk of court is directed to enter judgment and close this case.

Entered this 20th day of January, 2015.

BY THE COURT:

/s/

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WILLIAM M. CONLEY  
District Judge